No. 75-757

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

OLD DOMINION FREIGHT LINE, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. C) dismissing an action to set aside an order of the Interstate Commerce Commission (J.S. App. D). The Commission's order had approved a merger of Barnes Truck Line, Inc. ("Barnes"), into Old Dominion Freight Line, Inc. ("Old Dominion"), conditioned upon the cancellation of a portion of Barnes' general commodity authority and of certain specific commodity authorities which were found to be dormant.

Under Section 5(2)(b) of the Interstate Commerce Act, 24 Stat. 380, 49 U.S.C. 5(2)(b), a motor carrier may

acquire control of, or merge with, another motor carrier only if the Commission finds that the proposed transaction "will be consistent with the public interest." In determining the public interest, the Commission has long held that operating rights that are "dormant," *i.e.*, that have not been actively utilized by the transferor, may not be transferred unless it is demonstrated that the service authorized by the dormant rights is required by the public convenience and necessity. See *Braswell Motor Freight Lines, Inc.* v. *United States*, 275 F. Supp. 98 (W.D. Texas), affirmed, 389 U.S. 569.

Prior to 1969, appellant Barnes held certain general commodity rights in parts of a five-state area on the East Coast, and several specific commodity certificates to and from points in the East and Southeast. On June 24, 1969, appellant Old Dominion sought Commission authorization to acquire control of Barnes. Protests were filed by competing carriers, including appellee Colonial Motor Freight Line, Inc. Following lengthy hearings, an Administrative Law Judge concluded that substantial portions of Barnes' general commodity rights were dormant and recommended that the application be denied without prejudice to the parties' submission of a revised plan eliminating the dormant rights (J.S. App. D, 54a-55a).

On exceptions, Division 3 of the Commission upheld the law judge's findings (J.S. App. D, 57a-58a). In addition, Division 3 concluded after review of the evidence that, since virtually all shipments transported by Barnes between December 1968 and May 1969 under specific commodity authority had consisted of lumber and related products, Barnes' specific commodity authority was dormant except for the transportation of those products

(J.S. App. D, 59a). Accordingly, Division 3 held that the transfer of Barnes' special commodity rights should be limited to "the transportation of lumber, flakeboard, pulpboard and other lumber-related commodities" in its operating area (*ibid.*). A petition seeking further hearing or reconsideration, alleging that Division 3 had erred in finding large portions of Barnes' authority to be dormant, was denied by Division 3 (acting as an Appellate Division) because the number of shipments was "insignificant and are not of sufficient caliber to justify classifying the authority as active" (J.S. App. D, 71a).

On review, the three-judge district court unanimously affirmed, holding that the "Commission['s] decision was based on a consideration of the relevant factors and that there has not been a clear error of judgment" and "that the Commission's action was neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that it is supported by substantial evidence" (J.S. App. C, 13a).

ARGUMENT

The sole issue presented by this appeal is whether the Commission properly applied certain well-established principles for determining the dormancy and transferability of operating authorities. This essentially factual determination, and the discretionary judgment whether such transfer would be in the public interest, do not warrant plenary review. See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607. The decision below is correct and should be affirmed.

1. Appellants' principal contention (J.S. 9-16) is that the district court erroneously sanctioned the Commission's departure from the "substantiality test" that has long been utilized in determining whether particular operations

are dormant. This claim is based entirely upon the Commission's failure to use the precise words "substantiality test" in its report, or explicitly to reiterate the factors traditionally considered under that test. A review of the Commission's decision, however, indicates that it in fact employed the "substantiality test" in evaluating the evidence of Barnes' operations. The Commission, for example, expressly analyzed those operations in terms of the accepted "substantiality test" criteria: (1) the nature of the rights involved (J.S. App. D, 18a-19a); (2) the actual use of those rights (*id.* at 19a, 22a, 30a-34a, 42a-43a); (3) the rights and actual operations of other motor carriers in the affected area (*id.* at 35a-51a); and (4) other significant factors such as the economic health and potential of the area served (*id.* at 53a, n. 8). On the basis of this detailed analysis, the Commission concluded that Barnes' general commodity rights were "practically dormant" (*id.* at 53a) and that its specific commodity rights were "dormant for all practical purposes" (*id.* at 59a), and characterized the shipments under both authorities as "insignificant and * * * not of sufficient caliber to justify classifying the authority as active" (*id.* at 71a).

These findings, all of which were supported by evidence that appellants do not challenge as insubstantial, were clearly sufficient to permit "the agency's path [to] be discerned," *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc., supra,* 419 U.S. at 286, and the district court therefore correctly concluded that "the decision of the Commission was based on a consideration of the relevant factors" (J.S. App. C, 13a).[1]

[1]Indeed, appellants' claim that the Commission improperly departed from the "substantiality test" is further weakened by their concession (J.S. 14) that the test "has been consistently applied in past and subsequent decisions whenever the Commission has had to measure the past activity of operating authority sought to be transferred in Section 5 proceedings."

2. Since the Commission's order did not depart from the "substantiality test," there is nothing to appellants' claim that the decision of the court below conflicts with that of another district court in *Wright Trucking, Inc.* v. *United States,* D. Mass., Civ. No. 73-1445-C (April 3, 1975). In *Wright,* the reviewing court had difficulty understanding the Commission's conclusion that a carrier's rights were dormant and, accordingly, remanded the case to the Commission for an expanded articulation of its reasons. Here, the district court concluded that the Commission's finding of dormancy was supported by the evidence, adequately explained, and legally correct. Similarly, there is no conflict between the Commission's decision in this case and its finding some seven years earlier that, when the license now owned by Barnes was held by Coker Freight Lines, the operations conducted by Coker were substantial and the rights were not then dormant.[2] The two decisions involved the operations of separate carriers, conducted during entirely different time periods. A finding of active operations at one point certainly does not preclude a finding of dormancy at a subsequent point.

3. The Commission's decision also does not violate the admonition of *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, against "atomization" of operating rights. Even apart from the fact that *Carolina* involved a different statute,[3] under which the Commission's

[2]*Barnes Truck Line, Inc.—Purchase—Coker Freight Lines, Inc.*, Docket No. MC-F-9343.

[3]*Carolina* involved the "grandfather" clause of Section 206(a) of the Act, 49 U.S.C. 306(a), which required the Commission to issue a certificate upon proof that the carrier had engaged in bona fide operations on and since the statutory cut-off date "without requiring further proof that public convenience and necessity will be served by such operation." Under Section 5, in contrast, the Commission has extremely broad power to determine whether, and upon what terms and conditions, a proposed acquisition will be consistent with the public interest. *McLean Trucking Co.* v. *United States,* 321 U.S. 67.

powers were more limited than under Section 5, the Court there emphasized the power of the agency to restrict a carrier's certificate when its "holding out and actual performance were limited to a few articles only" (315 U.S. at 483) or were geographically "confined to narrow limits" (315 U.S. at 481). As appellants concede (J.S. 9-16), the Commission consistently has refused to approve the transfer of dormant rights in a Section 5 proceeding. This well-established policy, which has repeatedly been upheld by the courts, is designed to prevent the authorization of a *de facto* new service in contravention of the express legislative directive (49 U.S.C. 307) requiring a showing of public convenience and necessity before a certificate authorizing new operations may be issued. See *Consolidated Copperstate Lines* v. *United States*, 393 F. Supp. 858 (C.D. Cal.), affirmed, 394 U.S. 719. The conditions imposed by the Commission's approval in the instant case simply precluded the transfer of certain operating authorities that Barnes had not actively utilized prior to the proposed transaction, and were thus fully in accord with *Carolina* and with the agency's responsibilities under Section 5 of the Act.

4. Furthermore, the Commission's decision adequately considered its impact upon carrier employees. Contrary to appellants' contention (J.S. 27), the Commission need not make specific findings concerning an applicant's employees, but only is required by Section 5(2)(c) to "give weight" to this factor. See *M & M Transportation Co.* v. *United States*, 128 F. Supp. 296 (D. Mass.), affirmed, 350 U.S. 857. Here, the Commission expressly concluded that such employees would not be adversely affected by its order (J.S. App. D, 60a); that conclusion is entirely rational in light of the fact that the Commission authorized the transfer to Old Dominion of all authority under which operations had been actively conducted by Barnes. Compare *American Buslines, Inc.* v.

United States, 253 F. Supp. 481 (D. D.C.), affirmed, 385 U.S. 38. Moreover, appellants failed to raise this matter in a timely fashion in the administrative proceedings.[4] See *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

Nor did the Commission err in refusing to consider operations conducted subsequent to negotiations for the sale of Barnes' operating rights. Except in unusual circumstances, the Commission rarely has given weight to operations conducted after the transferee has obtained temporary control of the transferor, see *Buckingham Transportation, Inc.—Control and Merger*, 80 M.C.C. 245; *Cassens Transport Co.—Purchase—Speedway Transports*, 70 M.C.C. 379, and the courts have consistently recognized that the Commission is under no obligation to consider such operations. See, *e.g.*, *C & H Transportation Co., Inc.* v. *United States*, 249 F. Supp. 97 (N.D. Texas).

Bowman Transportation, Inc.—Control and Merger, 93 M.C.C. 133, on which appellants rely, is inapposite because there, unlike the present proceeding, evidence of operations conducted under temporary authority was adduced by the carrier at the proper time for the purpose of demonstrating that the protestant's services were inadequate and that the new service instituted under temporary authority was therefore required by the public need. Here, however, appellants did not raise the issue of the inadequacy of existing service during the initial

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[4]The issue was raised for the first time by appellants in a petition filed after the administratively final decision had been rendered by the Commission. While the petition alleged that "more than one hundred employees" would have to be terminated due to the ordered cancellation, the administrative record contained no evidence in support of that allegation nor any proof that Barnes had ever employed that many employees. Indeed, prior to filing the petition, appellants had stated in a petition to amend their application, filed after the Administrative Law Judge's decision, that carrier employees would not be adversely affected.

proceedings and no evidence of public need for new service was proffered until the filing of shipper affidavits in support of a petition for rehearing. The Commission's rejection of the petition and supporting affidavits at that stage was a proper exercise of its discretion. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 294-296; *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 535.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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